IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

City of Milwaukee, The Sewerage Commission Of The City of Milwaukee, And The Metropolitan Sewerage Commission Of The County Of Milwaukee,
Petitioners,

vs.

People Of The State Of Illinois And People Of The State Of Michigan,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF MILWAUKEE, ET AL.

BRONSON C. LA FOLLETTE
Attorney General

NANCY L. ARNOLD
Assistant Attorney General

LINDA H. BOCHERT
Assistant Attorney General

Attorneys for Amicus Curiae, State of Wisconsin

Department of Justice
114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1221

October, 1979

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STATEMENT OF THE CASE

We respectfully refer the Court to the Citation Of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the Petition for Writ of the City of Milwaukee, et al. filed with the Court in this proceeding.

The State of Wisconsin by its Attorney General respectfully submits this brief amicus curiae, in support of the Petition for a Writ of Certiorari of the City of Milwaukee, et al., pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Has the federal common law of nuisance survived the enactment of the Federal Water Pollution Control Act of 1972 (hereinafter FWPCA)?

2. If it has, what degree of deference should a federal court exercising that jurisdiction pay to the national regulatory scheme established by the FWPCA and to state action under that Act to enforce its requirements?

INTEREST OF AMICUS CURIAE

The United States Congress enacted the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 33 U.S.C. §§ 1251-1376, to provide a comprehensive, uniform, and national solution to the problem of pollution of the waters of the United States. Pursuant to sec. 402(b), 33 U.S.C. § 1342(b) of the Act, the enforcement obligations of the National Pollutant Discharge Elimination System in the State of Wisconsin were delegated to the Wisconsin Department of Natural Resources and the Attorney General of the

State of Wisconsin. In order to fulfill those obligations, Chapter 147 of the Wisconsin Statutes was enacted in 1974, creating the Wisconsin Pollutant Discharge Elimination System (WPDES), consistent in all necessary regards with the requirements of the federal act.

Pursuant to the requirements of these state and federal laws, the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee applied for and obtained WPDES permits from the State of Wisconsin for the operation of their sewage collection and treatment facilities. When the Commissions violated the requirements of those permits, the State of Wisconsin brought suit to enforce the requirements of the law and to secure abatement of water pollution in the area served by the Commissions.

On May 25, 1977, the State of Wisconsin concluded its enforcement action in State Circuit Court against the two Commissions with a judgment which complies with federal and state water pollution laws and standards, which comprehensively addresses the attainment of effluent limitations and abatement of combined sewer overflows (CSO), and which adequately protects the interests of residents of Illinois, Michigan and Wisconsin in limiting discharges of pollutants to Lake Michigan.

On November 15, 1977, the United States District Court for the Northern District of Illinois entered a judgment requiring the Commissions to treat all sewage to meet certain effluent limitations six times more stringent than those required under the FWPCA and to construct a system to eliminate all overflows of raw sewage from combined sanitary and storm sewers. On April 26, 1979, the Court of Appeals for the Seventh Circuit reversed the order of the District Court

insofar as it imposed effluent limitations stricter than those required under the FWPCA. It affirmed that part of the order requiring the elimination of all sewage overflows.

While the exercise of jurisdiction by a United States District Court may appear compatible with that of Wisconsin, this is not necessarily the case. While attempting to reach similar goals, the remedies of the two courts may conflict in such a fashion as to frustrate the efforts of the State of Wisconsin and to usurp its enforcement authority.

This fact has far-reaching implications for the State of Wisconsin and all other states with delegated authority under the FWPCA or the Clean Water Act of 1977 (hereinafter CWA), PL 95-217, 33 U.S.C. §§ 1251-1376. If other jurisdictions may rely on the federal common law of nuisance as Illinois did here, while choosing to ignore the opportunities provided for enforcement through the NPDES process, conflicting results, multiplicity of suits, and frustration of the national goal of clean water will be the result. Such disruption of the NPDES State enforcement process undermines its integrity and should not be lightly approved.

Accordingly, the State of Wisconsin urges this Court to grant the Writ of Certiorari and determine what, if any, vitality the federal common law of nuisance maintains in light of the FWPCA and the CWA. If the federal common law of nuisance does survive, then this Court has the opportunity to declare for the benefit of local, state and federal government that, while a federal court might properly exercise federal common law jurisdiction in this area, when the responsible state authorities are clearly fulfilling their enforcement obligations under the national regulartory scheme the federal court must defer to the state's expertise in establishing the remedy.

This Court should be very wary of suggestions that the remedy imposed by the state pursuant to Congressional mandate is not adequate. After all, the citizens of Milwaukee, Kewaunee, Manitowoc, Sheboygan, Racine and Kenosha, Wisconsin have as much interest in clean Lake Michigan water for drinking and recreation as do the citizens of Illinois. Indeed, being closer to the source of the alleged pollution they and their state government have more reason to be concerned than does Illinois.

ARGUMENT

I. The 1977 Wisconsin Judgment Is A Major Commitment By The Petitioner Sewerage Commissions To Abatement Of Water Pollution And Will Adequately Protect The Citizens Of Illinois, Michigan And Wisconsin

Legal action by the State to enforce federal and state water pollution requirements culminated on May 25, 1977, in the entry of a detailed stipulation between the State and the Commissions which is incorporated in the Wisconsin Judgment. [*The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources, Case No. 152-342, Cir. Ct., Dane County.*] The commitment made by the Commissions extends over several decades and represents a major undertaking in terms of federal, state and local dollars expended and level of treatment achieved.

The Wisconsin Judgment is divided into sections, each of which addresses a different aspect of the water pollution problem in Milwaukee. In brief summary, the Wisconsin Judgment requires the Commissions to comply with applicable effluent limitations, to eliminate any dry weather bypassing within the service area, to eliminate all wet weather bypassing, to correct all combined sewer overflows and to restrict all sources of additional waste flow into the system, all by prescribed deadlines. Each deadline established is specifically related to each other, so that constant, maximum effort based upon established priorities is assured.

The Wisconsin Judgment is a comprehensive and balanced approach to the sources of water pollution within the control of the two Commissions. It requires the Commissions to undertake long term, complex abatement efforts and to complete projects and components of those projects in compliance with a detailed and carefully developed schedule of deadlines. The Wisconsin Judgment exemplifies the complex and large scale nature of water pollution abatement in a major metropolitan area. But more importantly in the current context, it exemplifies the State of Wisconsin's determination to fulfill its obligations to the citizens of Wisconsin as well as other states to secure and maintain clean water within its jurisdiction, and to fully and adequately enforce the requirements of the Federal Water Pollution Control Act and the NPDES/WPDES program.

II. Congress Intended To Create A Comprehensive Scheme Of Regulation, And A Remedy Developed Pursuant To This Scheme Must Preempt Other Or Different Approaches

In the case of *Illinois v. Milwaukee,* 406 U.S. 91 (1972), while sending the State of Illinois back to the appropriate district court to pursue its action, the Court commented that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107. Shortly thereafter, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. We submit that preemption has in fact occurred.

The major purpose of the Act was to create a comprehensive, uniform scheme to achieve the elimination of water pollution on a nationwide basis. At the same time, the Act was designed to eliminate *ad hoc* approaches to solving the problems of water pollution. As expressed in the Report of the Senate Committee on Public Works:

> Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound, detailed information on the costs which will be associated with the later stages of the control program, and allow subsequent Con-

> gresses to evaluate the success of the policy enunciated in this bill.

U.S. Code Congressional and Administrative News, Vol. 2, 1972, p. 3758.

The Wisconsin Department of Natural Resources applied its considerable expertise to solving the water pollution situation in Milwaukee and it developed a master plan for doing so.

The remedy created by the federal court, in contrast, represents just the kind of *ad hoc* approach to problem-solving Congress was trying to avoid. Congress expressly recognized that sound technology was fundamental to development of reasonable solutions to problems of water pollution. The Senate Committee stated, in reference to the "citizen suit" provision of the Act:

> Section 505 would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

Id. at 3745.

> Enforcement of pollution regulations [once established by the EPA under the statutory scheme] is not a technical matter beyond the competence of the courts. The citizen suit

> provision is consistent with principles underlying the Federal Water Pollution Control Act, that is the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for enforcement. *Id.* at 3747.

Id. at 3747.

Congress expected the EPA, and in turn, the state agencies, to develop the technical base for a sound pollution abatement program. Congress also specifically demonstrated its intent to relieve the district courts of the difficult technological inquiries and determinations of the specific kind of which Judge Grady complained by saying:

> Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem. (Pet. App. F-3 and 4)

Where Congress has decisively acted to create a comprehensive regulatory scheme and an effective enforcement mechanism to support it, the courts are left no room in which to entertain and apply equitable remedies based on the common law. For example, in the leading case of *Arizona v. California,* 373 U.S. 546 (1963), the comprehensive scheme created by Congress for allocation among the states of the waters of the Colorado River was held to preclude the courts from applying common law notions of equitable apportionment to determine the water rights of each state involved.

Here, not only has Congress provided a comprehensive statutory alternative inconsistent with continuing invocation of the common law, but the specific problem presented to the federal court for decision was addressed and resolved in the state court. The case for Congressional preemption must be even stronger where, as here, Congressional policy has already been applied at the time the federal judiciary is called upon to act.

The remedy imposed by the State represents application of the highest scientific expertise, conforms to the long-range goals set by Congress, and is consistent with uniform, orderly enforcement of our nation's water pollution control program. The judgment of the federal court leads to regulatory chaos. Progress toward consistent, uniform improvement in water quality demands that solutions to problems of water pollution flowing directly from the Congressional mandate preempt those that do not.

III. Assuming That A Federal Common Law Nuisance Action Survives, The District Court Should Have Deferred To The Judgment Of The Wisconsin State Court Entered Pursuant To State And Federal NPDES Requirements And Refrained From Imposing A Different Remedy

The Seventh Circuit specifically considered and rejected the argument that the enactment of the FWPCA had preempted the federal common law of nuisance in the area of water pollution. Should this Court sustain that determination, a question of equal if not greater importance remains: how are the two authorities to operate effectively in the same arena?

The brief of Amicus Curiae Association of Metropolitan Sewerage Agencies, et al., emphasizes the confusion and unnecessary expense which will be suffered by municipalities across the nation if guidelines on the use of federal common law are not developed by this Court. Similarly, those states such as Wisconsin which are charged with fulfilling their obligations under the national NPDES scheme will find their efforts frustrated, subject to collateral attack, and possibly countermanded by federal courts which choose to fashion remedies completely independent of those imposed by the state./[1]

/[1]It is the State's position that compliance with state law is required regardless of whether federal financial assistance can be made available. However, the State agrees that in a situation such as that faced by Milwaukee, where the pollution abatement program necessary to comply with the law will extend over

The abatement program developed by the State of Wisconsin pursuant to the comprehensive NPDES regulatory scheme must preempt the *ad hoc* problem solving engaged in by the federal court. Basic principles of abstention and comity demand that independent judicial approaches to problem-solving in this area give way to programs developed under Congressional authorization.

A. Comity and Abstention.

Had the State of Wisconsin initiated its action against the Milwaukee Commissions prior to the filing of the federal action, we would emphatically assert that the doctrine of abstention required the federal court to refuse to exercise its jurisdiction.

Abstention is proper for reasons of judicial economy so that one lawsuit will suffice to dispose of the problem, rather than permitting two with the possiblity of conflicting results as well as multiple costs. *White v. Husky Oil Co.*, 266 F. Supp. 239 (D. Mont. 1967). Equitable restraint should be exercised by a federal court where granting of relief would adversely affect the results of a state court action. *Sartin v. Commissioner of Public Safety of St. Of Minn.*, 535 F. 2d 430 (8th Cir. 1976). Further, it is the duty of a federal court to avoid unseemly conflict with a state

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several decades and cost hundreds of millions of dollars, cost to the taxpayers can and should be recognized in the *timetable* established for compliance. The Wisconsin Judgment specifically treats the issues of compliance with the requirements and means of financing separately and in this fashion by establishing priorities and interrelated deadlines for the projects. The federal court's disregard for cost and priorities imposed by Wisconsin threatens the State's carefully laid plans for abatement.

court. *Landis v. Northern American Co.*, 299 U.S. 248 (1936). Implicit in these pronouncements is the notion that an action involving substantially the same question is pending in another forum which can provide an adequate remedy. *Butler v. Judge of U.S. District Court,* 116 F. 2d 1013 (9th Cir. 1941). Neither the parties in the state court nor the issues need be identical. *Landis, supra.*

However, it is clear that the doctrine of abstention is not normally invoked when, as here, the federal action was initiated first. Nonetheless, the guiding principles of that doctrine and the doctrine of comity strongly support the State's position that substantial deference to the state court and the NPDES requirements was required when the federal court reached the point of establishing the proper remedy. The state court had already imposed a remedy consistent with the requirements of the federal and state NPDES programs to solve the identical problem the federal court action sought to resolve. Federal court invocation of the comity principle at the point of establishing the remedy would have had substantial value here in securing uniformity of decision and remedy. *Lauer v. Freudenthal,* 96 Wash. 394, 165 P. 98 (1917).

Our constitutional system recognizes the principle of deference by one branch of government to another within each branch's sphere of influence. Congress, a coordinate political department, has constitutional authority to regulate and protect interstate waterways. The specialized nature of the subject requires deference. The correction of overflows from combined sanitary and storm sewers, for example, involves technical determinations to which the courts bring little expertise. The district court admitted it found the data presented incomprehensible. Congress gave the EPA the primary task of administering the program,

and gave it authority, in turn, to delegate this responsibility to the various states. The expertise employed by the State of Wisconsin Department of Natural Resources in designing a remedy for the water pollution problem here was employed pursuant to the delegation of authority from the EPA and ultimately the Congress. The remedy imposed on Milwaukee derived, then, from the Congressional mandate. The state court judgment was entered pursuant to the comprehensive federal scheme embodied in federal statutes.

The trial court should have deferred to the legislative judgment and accepted as its guide the decisions of the Congress regarding what is necessary to protect interstate waters. At the very least it was incumbent upon the federal court to inform itself of the requirements of the Wisconsin Judgment and to reach a determination as to that remedy's ability to meet the needs of the plaintiffs, Illinois and Michigan. Absent such an evidentiary determination regarding the state's remedy, the federal court was unable to determine the need for it to act. Had such an inquiry been made and had the court been satisfied, as we submit it would, that the state remedy was sufficient, it should then have deferred to that expertise in establishing the remedy. Failing to do so, a federal court risks interruption and frustration of the national pollution abatement process which Congress intended to establish.

This principle of deference is akin to the separation of powers doctrine and is best explained in terms of its similarity to the political question doctrine under which courts decline to decide issues more properly resolved by another branch of government.

> ... Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Furthermore, the NPDES/WPDES program provides an adequate administrative forum for consideration of water pollution and public health related issues.

NPDES permits issued by the Wisconsin Department of Natural Resources must meet federal water quality standards and comply with applicable federal laws and regulations, secs. 147.02 (3) (d) (1) and (2), Wis. Stats. Sections 147.09, 147.11, 147.13, and 147.20, Wis. Stats., establish the requirements of notice and opportunity for hearing in the Department of Natural Resources' administration of the NPDES Program in Wisconsin. Under these sections, any affected state may secure a hearing on a permit application, proposed permit or permit modification, or issued permit.

The State of Illinois receives notice of all such permit actions affecting Lake Michigan. It received notice of the original permits proposed for the Milwaukee treatment plants in 1974, and notice again when those permits were issued in late 1974 and early 1975. Similarly, the State of Illinois received notice of the Department's intention to reissue permits to South Shore and Jones Island in 1978, and notice of the actual reissuance of those permits in 1978.

The State of Illinois never availed itself of these opportunities to "make its case" against Milwaukee in the administrative forum. At no time did the State of Illinois submit comments to the Department of Natural Resources on the Milwaukee permits, participate in permit hearings, or seek a hearing on its own motion. The State of Illinois has totally refused to utilize that administrative forum, with its technical expertise, which remains available to it for purposes of making its case. It chose instead to present its case in the judicial forum, where the expertise does not exist, and in so doing ignored the forum for resolution of these issues which Congress clearly intended.

B. Lack of Emergency.

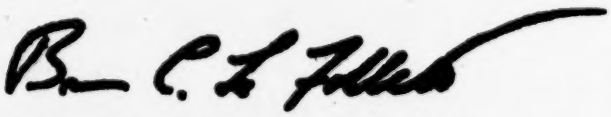
Under well-settled principles of equity jurisprudence, injunctive relief should be granted only when the right to relief is clear. *Missouri v. Illinois,* 180 U.S. 208, 248 (1901). Plainly, there was no compelling need for the court to impose the remedy it did. There was no sudden, dramatic increase in the rate or amount of effluents discharged into the lake, no sudden decrease in water quality near Chicago attributable to Milwaukee, and no evidence of a water-borne outbreak of disease among Chicago residents. Furthermore, the remedy, involving tremendous additional costs to Milwaukee area residents, was imposed without evidence that commensurate additional benefits would accrue to Illinois.

Similarly, we suggest that under established principles of abstention, comity and judicial deference to legislative judgment a court is obliged to act, if at all, with great restraint. We respectfully suggest that if this Court finds that the federal common law of nuisance survives the federal Act, the Court must fashion and require strict adherence to a rule limiting exercise of jurisdiction in these cases to genuine emergency cases, imposing liability only on a clear and convincing showing of a clear and present (not potential) danger, and fashioning a remedy only where the link between the remedy and the harm to be alleviated is beyond dispute and the responsible state government has clearly failed to act. No such showing was made in this case. These circumstances dictate that the District Court should have permitted Milwaukee to proceed to implement the remedy imposed by the state court according to the schedule approved by that court.

CONCLUSION

The circumstances of this case present this Court with the opportunity to determine if the federal common law of nuisance has survived the adoption of the Federal Water Pollution Control Act, and if it has, what degree of deference a federal court must pay to the national regulatory scheme established by Congress and to state actions taken in furtherance of those national goals. A decision on these questions is of paramount importance to the federal government, to each of the states, and to their political subdivisions. We urge the Court to grant the Writ and to review the case on the merits.

Respectfully submitted,



BRONSON C. LA FOLLETTE
Attorney General

NANCY L. ARNOLD
Assistant Attorney General

LINDA H. BOCHERT
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Attorneys for Amicus Curiae,
State of Wisconsin

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